United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

76-7208,7211

To be argued by
VICTOR S. CICHANOWICZ

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF,
Defendant and Third Party Plaintiff-Appellant and Appellee,

against

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,
Third Party Defendants-Appellants and Appellees.

9/5

BENITO LOPEZ,
Plaintiff-Appellee,

against

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF THIRD PARTY PLAINTIFF-APPELLANT

CICHANOWICZ & CALLAN
Attorneys for Defendant and Third Party Plaintiff-Appellant Egan Oldendorf
80 Broad Street
New York, N. Y. 10004
344-7042

VICTOR S. CICHANOWICZ
Of Counsel

TABLE OF CONTENTS

TABLE OF CASES

REPLY BRIEF OF THIRD PARTY PLAINTIFF-APPELLANT

Scope of This Reply Brief

This brief is a reply to the brief of Plaintiff-Appellee and is directed to Point I thereof.

POINT I

The verdict of the jury against the shipowner is not only inconsistent but is contrary to the law and the evidence.

Reduced to its simplest terms, this case involves an injury to a longshoreman on board a vessel which resulted when a draft of cargo struck and dislodged another piece of cargo which was stowed in the hatch in which the injured longshoreman was working. The accident occurred at the beginning of the discharging operation and arose in the course of the removal by a shoreside crane of the very first draft of cargo from the #1 hold of the M/V JOBST OLDENDORF at Port Newark, the vessel's first port of call. The action which caused the draft to come in contact with and dislodge the cargo resulted from the negligence of a crane operator in the employ of a third party in raising the boom of the crane instead of merely raising the draft by means of hoisting cable of the boom, as he had been directed by the signalman. The effect of raising the boom rather than taking up on the hoisting cable, was to cause the draft to slide across the hatch from offshore to inshore over the cargo of steel I beams stowed therein, and eventually strike and dislodge one of the I beams causing it to topple over onto plaintiff's left leg.

Notwithstanding the clear mandate of the United States Supreme Court in *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971) that a shipowner is not liable for a third party's single and wholly unforeseeable act of negligence,

even under the strict liability concepts as they have been expanded under the doctrine of unseaworthiness, plaintiff urges that the jury's finding of shipowner negligence nonetheless should be sustained because of testimony that prior to the discharging operation, the ship's crew had removed the lashings and chocking by means of which the cargo had been secured for the ocean voyage.

Aside from the fact that the testimony with respect to the alleged removal of the chocks and bracings is contrary to the physical facts as the photographs (Ex. C-1, D-1)* which were taken shortly before the accident conclusively demonstrate, plaintiff's attempt to sustain the jury verdict by converting this case into one of conditionally improper stowage is not only in conflict with the jury's findings in this case and not in accord with the evidence, but has no basis in law.

At page 12 of his brief, plaintiff characterizes the alleged removal of the bracings and chocks as a "negligent disregard of the operative procedure by the longshoremen in having to move the drafts over unsecured steel beams". At page 14 of the plaintiff's brief, it is stated that, "By the very act of cargo discharge, a conditionally proper stow was the cause of the toppling of the beam when the condition of securing or first removing the unsecured stow was not fulfilled, as in *Amador supra.*" Neither statement, however, is supported by a reference to the record.

---

* Exhibit C-1 was taken from the aft end of #1 hatch and shows forward end of hatch and portion of the aft end of #1. A portion of the beam which was dislodged is designated by a check mark and the letter X and appears in the forground slightly to the left of center. (Page E-1 of Exhibit Volume.)

Exhibit D-1 was taken from the forward end of #1 hatch and shows the after end of #1 hatch. The beam which was dislodged is designated in this exhibit by the letter X. The letters B designate bracings, and the letter D a divider. (Page E-2 of Exhibit Volume.)

In *Amador* v. *A/S J. Ludwig Mowinckels Rederi,* 224 F.2d 437 (2 Cir. 1955), the longshoremen were required to discharge cargo up and over other cargo which was consigned to a later port. As the discharging progressed, the pile of cargo destined for a later port became higher and higher and eventually some of it was struck and dislodged by a draft in the course of the discharging process which was dictated by the manner of stowage.

In this case, all of the cargo except some steel plates which were at the bottom of the #1 hatch and underneath the steel beams, was to be discharged at Port Newark, the vessel's first port of discharge (300a, 430a). There was no testimony or claim that the manner in which the cargo was stowed or that any ship's representatives in any way played any part in determining the order of discharge. Nor was there either need or reason for moving or dragging the drafts of cargo over other cargo before the draft could be raised from the hatch. No. 1 hatch had practically no wings either port or starboard and none forward of the hatch (55a, 86a-87a).

The decision of this Court in *Amador, supra* in no way supports the proposition that the stowage of cargo is only conditionally proper if in the course of discharging that cargo, a draft is negligently permitted to come in contact with cargo and dislodge it. In fact, this Court's decision in *Amador, supra,* makes it quite clear that when this occurs, there can be no liability even for unseaworthiness, let alone negligence. In that case, this Court said at 440 of 224 F.2d:

> "* * *; but the situation is to be distinguished from one in which the longshoremen were merely negligent in discharging a well stowed cargo."

In so holding, this Court was stating the very principle of law which the United States Supreme Court redefined in *Usner* v. *Luckenbach Overseas Corp.,* 400 U.S. 494

(1971). Actually, this case is quite similar to *Usner*. In the *Usner* case the winch operator, on signal from the flag man to lower the cargo fall further, lowered it too far and too fast as a result of which the sling attached to the cargo fall struck the injured longshoreman. In this case, the crane operator, on signal from the signalman only to raise the draft with the cargo runner, raised the boom instead, as a result of which the cargo was caused to slide across the hatch and strike a piece of cargo causing it to topple over onto the plaintiff. In the words of *Usner,* "[W]hat caused [plaintiff's] injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the isolated, personal negligent act of the crane operator". *Usner* v. *Luckenbach Overseas Corp.,* supra, at p. 500. To convert the crane operator's negligence into an unloading technique as plaintiff proposes, is not only contrary to the clear mandate of *Usner,* but unwarranted under any concept of law.

Plaintiff's reliance on such cases as *Henry* v. *A/S Ocean,* 512 F.2d 401 (2 Cir. 1975) and *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.,* 508 F.2d 437 (2 Cir. 1974), is misplaced.

In the *Henry* case, *supra,* this Court, after noting the broad definition which has been given unseaworthiness, held that the jury's finding of negligence but no unseaworthiness was reconcilable, stating at page 405:

> "If the trial judge had used such a general definition of unseaworthiness in the present case, Pittston might conceivably have some support for its position. Judge Carter, however, limited the jury to a narrow definition of the term, instructing that the jury could find unseaworthiness only if it found that plaintiffs' injuries were caused by defective equipment, i.e., equipment that was not reasonably fit for its intended purpose. In view of the court's limitation of unseaworthiness to the condition of the ship's equip-

> ment the jury may reasonably have concluded that other claims (e.g., failure to reposition the booms properly) could only be resolved on a negligence theory. The jury's findings on unseaworthiness and negligence were therefore not necessarily inconsistent."

In the *Conceicao* case, *supra,* this Court held that the jury's finding that the vessel was seaworthy but the owner negligent was reconcilable, stating at page 443:

> "The jury might properly have concluded that the shipowner's inadequate instructions to the Carpenters created a further duty to supervise the actual loading of the pipes and that the breach of this latter duty as an excessive number of pipes were loaded into the crib was the isolated event which cast liability on the shipowner for negligence."

In *Siderewicz* v. *Enso-Gutzeit O/Y,* 453 F.2d 1094 (2 Cir. 1972), the only assessment which this Court made of the meaning of *Usner* was that in the *Usner* case the Supreme Court had reiterated that a ship's unseaworthy condition could arise from an improper method of unloading her cargo and that since an improper method of unloading falls in the same class as an improper method of loading, the plaintiff had made out a *prima facie* case on the issue of whether the technique of unloading was proper or not. It, however, did not hold that the method of unloading somehow became converted instantaneously with the crane operator's negligence into an unloading technique.

Finally, the plaintiff's brief is also incorrect when it states that the decision of this Court in *Bernardini* v. *Rederi A/B Saturnus,* 512 F.2d 660 (2 Cir. 1975), is cited by the shipowner for a different proposition of law than inconsistency. In that case, this Court after nothing that while verdicts finding negligence but no unseaworthiness

can be reconciled, they are irreconcilable when the only negligence with which the shipowner can be charged derives from a breach of a duty with respect to a condition which the jury in finding the vessel seaworthy, found did not exist. As the shipowner's main brief points out, the record in this case is clear that the plaintiff's theory of negligence was predicated on the very same conditions that the unseaworthiness claim was based (177a) and since the jury found that the underlying condition did not exist the jury's findings are inconsistent and irreconcilable.

Conclusion

Since the verdict of the jury is not only inconsistent but contrary to both the law and the evidence, the judgment in plaintiff's favor against the shipowner must be vacated and set aside and the complaint dismissed and the judgment modified allowing the shipowner its costs of defense including reasonable counsel fees.

Respectfully submitted,

CICHANOWICZ & CALLAN
Attorneys for Defendant and
Third Party Plaintiff-Appellant
Egan Oldendorf

VICTOR S. CICHANOWICZ
Of Counsel

Due and timely service of Two copies
of the within Brief is hereby
admitted this 7th day of September 1976.

.....
Attorneys for Plaintiff - Appellee

Street Bobbe & Nash

ATTORNEYS FOR DEFENDANT - APPELLANT
AND APPELLEE HOFFMAN RIGLING

Alexander Ash Schwartz & Cohen

ATTORNEYS FOR THIRD PARTY DEFENDANT -
APPELLANT AND APPELLEE ITO